

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER SESSION, 1995

FILED
January 31, 1996
C.C.A. NO. 02C01-9506-CC-00178
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
Appellee,)
)
)
VS.)
)
CHAD DOUGLAS POOLE,)
)
Appellant.)

C.C.A. NO. 02C01-9506-CC-00178
HARDEMAN COUNTY
HON. JON KERRY BLACKWOOD
JUDGE
(Sentencing)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE
CIRCUIT COURT OF HARDEMAN COUNTY

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OPINION FILED _____

SENTENCE MODIFIED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant was convicted, upon his pleas of guilty, of Class E felony theft, two counts of burglary, especially aggravated burglary, and especially aggravated robbery. For these respective crimes, the trial court sentenced the Defendant as a Range I standard offender to concurrent terms of one year for the theft, two years for each of the burglaries, eight years for the especially aggravated burglary and twenty-one years for the especially aggravated robbery. It is from the sentence of twenty-one years imposed for the Class A felony of especially aggravated robbery that the Defendant primarily appeals.¹ We affirm the judgment of the trial court.

When there is a challenge to the length, range or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The Sentencing Commission Comments provide that the burden is on the appellant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential

¹While the Defendant argues in general terms that his sentences were excessive, the trial judge ordered the minimum sentence for each offense other than the especially aggravated robbery.

for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103 and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987) .

The Defendant's convictions herein grew out of three separate instances involving the Defendant and others. Because the Defendant's appeal is primarily from the twenty-one year sentence imposed for the especially aggravated robbery, we will address the facts of that offense in some detail.

The victim of this offense was a seventy-one-year-old woman who lived alone and ran a small grocery store. The Defendant and his co-defendant knew the victim and knew where she lived. According to the testimony of the co-defendant, both the Defendant and the co-defendant discussed and planned the robbery of the victim. On June 23, 1994, these two individuals went to her home, gained entry into the house and waited for approximately two hours until the victim came home that evening. The co-defendant was armed with a baseball bat. The Defendant had obtained black tape from his girlfriend and wrapped the bat with the tape so that the bat would become less visible.

When the victim entered her home, the co-defendant struck the victim in the back of the head with the baseball bat, knocking her unconscious. Property was removed from her person as she lay bleeding. The victim remained unconscious where she fell until she was discovered the next morning by members of her family. The injuries to the victim were severe. Her hospital and medical bills totaled over twenty-six thousand dollars. Luckily, the victim substantially recovered from her injuries, although at the time of the sentencing hearing, she continued to suffer some disabilities.

The presentence report reflects that the Defendant was twenty-one years old. He dropped out of school after completing the ninth grade. He has no history of steady employment. He reported regular and heavy use of marijuana.

In addition to traffic offenses, the presentence report reflects convictions of burglary, burglary of an auto, and two counts of theft in Weakley County in October 1994. As a juvenile, the report reflects one conviction for theft in 1991.

The Defendant testified at his sentencing hearing and stated that he had known the co-defendant for five or six years. He testified that the co-defendant asked him if he wanted to be a part of the robbery, and he said that "at first, I didn't; I didn't want to be a part." He testified that he did not participate in the robbery because he needed money. He stated that his girlfriend and his mother provided him with money. He admitted that the money taken from the victim was used to buy marijuana which he and the co-defendant smoked. He admitted that he knew that the co-defendant was going to hit the victim with the baseball bat. He said that he did not really want to participate in the robbery but that he was persuaded to go along with it.

The Defendant introduced a letter from a psychologist who had evaluated him at the Hardeman County jail. The psychologist stated that the Defendant "is a non-assertive follower who can easily be influenced or intimidated by his peers. This coupled with his history of heavy abuse of marijuana, which further exacerbates his apathy and lack of direction in life, resulted in his not having taken control of his life by setting goals and working towards them."

Especially aggravated robbery is a Class A felony, punishable by a minimum of fifteen years and a maximum of twenty-five years as a Range I standard offender. In ordering the Defendant's sentence of twenty-one years, the trial court found no

mitigating factors and applied the following enhancement factors: (1) That the Defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (2) that the victim of the offense was particularly vulnerable because of age or physical or mental disability; (3) that the offense involved a victim and was committed to gratify the Defendant's desire for pleasure or excitement; and (4) that the Defendant treated or allowed the victim to be treated with exceptional cruelty during the commission of the offense. Tenn. Code Ann. § 40-35-114(1), (4), (7) and (5).

The Defendant first argues that the trial court erred by not applying as mitigating factors the following: (1) That the Defendant played a minor role in the commission of the offense; and (2) that the Defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offense. Tenn. Code Ann. § 40-35-113(4) and (8). Based upon our review of this record, we cannot conclude that the trial judge erred by not finding the existence of either mitigating factor. If those factors were present at all, they were entitled to very little weight.

Concerning the enhancement factors, the Defendant argued at the sentencing hearing that his criminal record from Weakley County should not be used to enhance his sentence because the crimes occurred subsequent to the crimes for which he was convicted in the case sub judice. The Defendant does not make this argument on this appeal. We note that this court has held that trial judges can consider criminal convictions or any other criminal behavior which occurred prior to the sentencing hearing as constituting a previous history of criminal convictions or criminal behavior, regardless of whether the convictions or behavior occurred before or after the criminal conduct under consideration. State v. Ed Waters, No. 01-C-01-9106-CR-00158, Hickman County, slip. op. at 6-7 (Tenn. Crim. App., Nashville, filed Feb. 20, 1992), perm. to appeal denied, (Tenn. 1992).

The Defendant argues that the record does not support the finding by the trial court that the offense was committed to gratify the Defendant's desire for pleasure or excitement. We agree. The State has the burden of demonstrating that the crime was committed to gratify the Defendant's desire for pleasure or excitement. State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). While the Defendant denies any motive for committing the crime, we believe the record reveals that the motivation for the crime was to steal from the victim for the purpose of buying drugs. The State did not carry the burden of proving that the offense was done to gratify the Defendant's desire for pleasure or excitement.

The Defendant also argues that the trial judge erred in finding as an enhancement factor that the victim of the offense was particularly vulnerable because of age or physical or mental disability. The victim in the case sub judice was seventy-one years old and was apparently in good health at the time the offense was committed. No evidence was introduced indicating particular vulnerability. The Tennessee Supreme Court has held that the vulnerability enhancement relates more to the natural physical and mental limitations of the victim than merely to the victim's age. Adams, 864 S.W.2d at 35. Again, the State bears the burden of proving the victim's limitations rendering him or her particularly vulnerable. Id. In Adams, two of the victims of the Defendant's sexual abuse were four and five years old, respectively. Our supreme court found that the record failed to show how these victims were particularly vulnerable. Based on the supreme court's ruling in Adams, we feel constrained to hold that in the case sub judice, proof that the victim was seventy-one years old is not sufficient in and of itself to show particular vulnerability, even though it is clear from this record that each of the Defendants were much stronger than the victim. For this reason, we are compelled to agree with the Defendant that the trial judge erred in applying as an enhancement factor the particular vulnerability of the victim because of her age.

The Defendant next argues that the trial court erred in finding that the Defendant treated or allowed the victim to be treated with exceptional cruelty during the commission of the offense. We disagree. This elderly woman was knocked unconscious by a blow to the head with a baseball bat. Even though the Defendants knew that the victim lived alone, they left her lying unconscious and bleeding under such circumstances that it was unlikely that her condition would soon be discovered. In fact, the victim remained in such a condition all night long and was discovered by family members the next day. Because of the delay in receiving medical treatment, the victim is extremely fortunate to have survived this attack. We conclude that the record supports the finding of this enhancement factor.

We therefore conclude that the trial judge erred in finding and applying two enhancement factors. This does not automatically result in a conclusion that the trial judge erred in sentencing this Defendant in the middle of his range. Because we have decided that two of the four enhancement factors applied herein were inappropriate, however, we believe some modification should be considered. Based upon our careful review of this entire record, we conclude that the enhancement factors found herein justify the imposition of a mid-range sentence for this Defendant of nineteen years.

The judgement of the trial court is accordingly modified to reflect a sentence of nineteen years for the especially aggravated robbery.

DAVID H. WELLES, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE